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In the matter of
WAYNE G. SMITH
Claimant

Case No. 2001-LHC-2232
OWCP No.6-174501

v.

ADVANTAGE FINANCIAL GROUP
Employer

L. Jack Gibney, Esq.
For Claimant

Benford L. Samuels,Jr. Esq.
For Employer

Before: JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended. A hearing was held in Jacksonville, Florida on August 28, 2001. My Decision and Order is based on the entire record, including post-hearing briefs.

Background and History

Claimant, Wayne Smith, born June 25, 1945, on October 29, 1997 injured his right knee and shoulder as a result of an industrial injury. At the hearing the parties stipualted orally and in writing that: the Act applied; an employer/ employee relationship existed at the time of injury; the accident arose out of and in the course of employment; timely notice was given; the average weekly wage was $811.17; maximum date of improvement for both the shoulder and knee was June 10, 1999; temporary total disability benefits were paid based

on the average weekly wage from October 30, 1997 through November 20, 1999. Since then Claimant has been paid a loss of wage earning capacity of $367.44. (T-6-8)

The only issue remaining is the nature and extent of disability. Claimant contends he is permanently totally disabled. Employer acknowledges permanent injury, but contends only partial disability, which should be calculated at the rate currently being paid or at a lower rate.

Medical Evidence

Claimant was treated by Dr. R. Stephen Lucie at the Jacksonville Orthopaedic Institute, commencing on October 31, 1997 and continuing at least up until just two months prior to the hearing. Initial evaluation: “He relates that ha had to jump off a crane as it was beginning to roll over. He struck a 4x4 and then rolled out landing on this right shoulder and right knee. He stated that he struck a concrete and metal flooring and denies any loss of consciousness.” Physical examination showed weakness of 3/5 to flexion and extension against resistance. Neurovascular systems are satisfactory and intact to the right upper extremity. Pain in right knee. X-ray shows superior lateral facet fracture of the right knee. 12/4/97; MRI suggests complete right rotator cuff tear. Knee not totally healed but doing o.k. 1/13/98; right shoulder arthroscopy, decompression, joint debridement and open rotator cuff repair were performed. No complications. 2/2/98; discomfort upon all terminal ends of range of motion. Referred to physical therapy for more vigorous range of motion exercises. 2/19/98; x-ray shows fracture of the medial facet, same as previous x-ray. Continued pain at terminal ends in shoulder. Strength 3/5. Continue temporary total disability. 3/5/98; assessment; 1. Right rotator cuff partial repair, progressing. 2. Lateral facet patellar fracture. 3/23/98; slow progress on shoulder therapy, diminished rotation and pain in extremes. Knee cartilage loss indicating degenerative joint disease. Sedentary work only. 4/20/98; making good progress from both the knee and shoulder standpoint. “From a work standpoint, he really does not have anything he can do unless he can run his crane, and he is not able to do this at the present time.” Can do sedentary work. 9/4/98; has been hospitalized for a heart attack. Severe rotator cuff tear problem on hold. 10/16/98; due to myocardial infarction, will hold off considering surgical repair to rotator cuff. Can do sedentary work. 11/23/98; schedule right shoulder arthroscopy

and mini open rotator cuff repair. Temporary total disability. 1/27/98; followup from 1/19/99 surgery; wound looks good; easy range of motion. 3/8/99; complaints of leg pain. Impression: 1. Status post a right shoulder ratator cuff repair. 2. Minimal posttraumatic arthritis, right knee. 5/10/99; continued complaints of shoulder pain, biceps weakness. Released for sedentary type work, not to use right arm. 7/12/99; "He complains today of pain in his bilateral shoulders. Both hands are tender at the metacarpophalangeal joints of the index fingers and left middle finger. He is also having pain in his bilateral knees. Today we have basically confined his exam to his right shoulder since this is the workmans' compensation injury. His right shoulder shows minimal change in his range of motion in that today he can possibly get his shoulder up to 130 degrees. External rotation is still 85 degrees, internal rotation is 60 degrees, and abduction is to 90 degrees. He continues to be weak in the rotator cuff." Can return to modified work duty with limited use of right arm and lifting up to 20 lbs.

7/19/99; "I think Mr. Smith has reached his maximum medical benefit as of June 10, 1999. He has a 2% permanent physical impairment and loss of physical function throughout the lower extremities which translates to 1% of the whole body based on his patellar fracture and a 20% permanent physical impairment and loss of physical function referable to the upper extremity which translates to 12% of the whole body with a total of a 13% whole body impairment from his injury of October 29, 1997. These are the two injuries that we treated." 9/29/99; not much more can be done. 4/11 and 5/31/01; no show from patient. 6/6/01; right shoulder continues to cause discomfort. Generalized achiness and swelling of ankles does not appear related to his on-the-job injury.

In a deposition of August 17, 2001 Dr. Lucie stated that he last saw Mr. Smith on June 6, 2001 and doesn't plan to see him again. He was first released for work on March 5, 1998, and on June 7, 1999 upgraded to light work. (Dep-5-8) Under these restrictions Claimant could do the 911 operator job, alarm monitor and some security guard jobs. His arthritis in his leg would prevent him from walking more than two hours per day. His rheumatism and general achiness has not been demonstrated to be job related. (Dep-9-11)

Dr. Gregory Wynn, 11/27/97, gave magnetic resonance arthrography report of right shoulder; impression: 1. Full

thickness rotator cuff tear involving the supraspinatus tendon and possibly the infraspinatus tendon as well. 2. Avulsion of the anterior capsular mechanism (the subscapularis muscle/tendon and the capsule and anterior glenhumeral ligaments).

Lay Evidence

Claimant testified concerning the accident that the crane he was operating tipped backwards due to rotten flooring; ". when it did there's 10,000 pounds coming in the windshield with me. So I jumped out to get away from the crane, and as I got out on the track, it all hit and it catapulted me right straight up into the air. They tell me I went about twenty feet and landed head first on the deck of the barge and when I landed, they tell me– I have to say, 'They tell me,' because I can't remember too much. When you are flying like Superman you don't get too good a look...The landing was awful". (T-22)

He's had two surgeries on his shoulder and had his right knee in a cast for two or three months. Since he is right handed but can't use the right arm, his wife helps him with everything including dressing, cutting his food for eating and even bathing. He has to take a shower to clean himself after having a bowel movement. (T-26-29) Between his two surgeries he had a heart attack unrelated to his injury.

Claimant didn't look for work any time between January 2000 and August of 2001 because "...I personally don't think I can maintain a job. I think I will be terminated for either not appearing or I won't be able to handle myself when I need to go to the bathroom and one thing and another. And I just don't - I don't think I can work. ..I might add I've got a thing here from Social Security, these folks sent me to six or seven different places and doctors for tests, and did all kinds of tests and they don't think I can work either." (T-41) Social Security determined approximately a year before the hearing that he was totally disabled from time of his injury. He receives $904.00 per month. Claimant tried to obtain jobs as a courtesy to the attorneys involved. (T-40-43,56)

A deposition was taken of Albert Mark Capps, vocational consultant on August 23, 2001. He had reviewed the work of a Richard Hickey, and agreed with the analysis that based on medical reports Mr. Smith could do the work of a gate or security guard and some dispatcher jobs that did not require

frequent motion such as typing. (Dep-6-10) Mr. Smith's alleged personal hygiene problem is difficult to comment on. Nevertheless while it might cause difficulty in maintaining a job, it would not be a hindrance in obtaining a job. (Dep-11,12) Moreover, there are products available to help problems such as Mr. Smith alleges. The jobs surveyed by Mr. Hickey in his report of May 4, 2001 ranged from $6.00 to $8.50 per hour.

Mr. Gilbert Spruance, rehabilitation counselor was deposed on the same day. Claimant's advanced age and eighth grade only education would make it more difficult for him to obtain even an entry level job regardless of his injuries. (Dep-6-8) The skills of a crane operator, Claimant's job for over 30 years, are not transferable to an entry level job. His alleged inability to clean himself would not affect his obtaining employment, but it would impact maintaining employment. (T-30) Of the three job titles Dr. Lucie approved, a 911 operator, alarm monitor and a gate guard, Claimant could not do the first two based on lack of computer skills and education. While it is possible that he could do residential security guard work, the exhaustive companies surveyed by Mr. Spruance yielded no available jobs or qualifications that eliminated Claimant's ability to obtain the job. (T-23-40)

Conclusions

Where it is undisputed that the Claimant cannot return to his usual work, the burden shifts to the Employer to establish the availability of suitable, alternative employment. Caudill v. Sea Tac Alaska Shipbuilding, Inc., 25 BRBS 92 (1991). In Palombo v Director, OWCP, 937 F. 2d 70, 25 BRBS 1 (CRT)(2nd Cir. 1991) the Court stated: "Partial disability status commences on the earliest date that the employer shows suitable alternative employment to be available. Such a showing may not be applied retroactively so as to commence partial disability status before suitable alternative employment is shown to exist." See, also, Director, OWCP v. Berkstresser, 921 F. 2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990) The Court in Palombo was clear in its reasoning. "Our holding creates an incentive for the employer to show the availability of jobs at the earliest possible date, since the claimant will be entitled to total disability benefits until that date...[U]sing the date of maximum medical improvement as the beginning of partial disability status shown to be available, gives undue weight to the physical aspects of disability and tends to ignore the important economic consequences."

An employee can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). On the other hand, the employee must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. New Orleans Gulfwide Stevedores v. Turner, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981); Palombo, *supra*.

A Claimant's condition changes from temporary to permenent when he reaches maximum medical improvement, which is primarily a medical condition. Trask v. Lockheed Shipbuilding and Construction Co., 17 BRBS 56 (1985)

I find by a clear preponderance of the evidence that Claimant's stipulated to permanent disability is partial and not total. Even Claimant's rehabilitation consultant did not allege that a security guard position would be beyond his capability. I reject Claimant's allegation that diligent effort was being made to obtain employment. Claimant's candid remarks that he was merely attempting to please the attorneys involved in looking for a job, which he attempted weakly to explain away, was revealing of less than strong motivation to return to work. Indeed, I am not unsympathetic to Claimant's situation of holding a relatively interesting and demanding job as a crane operator for over 30 years at a good salary not wishing to take sedentary and less active and interesting work. Upon obtaining Social Security benefits, Claimant would be even less motivated to jeopardize these payments by returning to some work. Moreover, the ruling of disability by the Social Security Administration has no relevance here, since the basis on which it was made is not known. Claimant testified that it was not before an administrative law judge. Further, the impact of claimant's heart attack between surgery could have affected the Social Security determination. As was agreed to by the parties in this case, the heart attack was not relevant to the issue of disability since it was not caused by the industrial caused injury.

Most jobs enumerated in Employer's job search are well within Claimant's medical limitations set out by Dr. Lucie, the only physician to report on Claimant's medical condition. Claimant has limitations, both as to education and age in

addition to his medical condition caused by his injury, but these would not prevent him from obtaining employment of a sedentary nature at entry level. Claimant's own subjective opinions that he could not physically do some of the job offers are not persuasive and are more indicative of his lack of motivation than a realistic assessment of physical limitations. Employer need not act as an employment agency. His market survey was more than adequate in determining available jobs, particularly in light of the apparent intention of Claimant not to validly seek or accept further employment. Stated differently, I find that Claimant has not used due diligence in seeking suitable alternative employment.

Similarly, I reject Claimant's often alluded to alleged inability to have proper hygiene after bowel movements. Both Mr. Capps and Mr. Spruance stated that the problem, if true, might prevent his holding employment but would not prevent Claimant from obtaining employment. It would seem eminently reasonable that should employment come his way, a left-handed resolution of the problem would be within the expectation of most reasonable people.

The job opportunities described by Mr. Hickey that Claimant could perform given his physical limitations and as approved by Dr. Lucie were in the range of $6.50 to $8.00 per hour. I find a rate of $7.00 for a full week, resulting in an average weekly wage of $280.00 is reasonable. The loss of wage earning capacity is, therefore, $531.17 ($811.17 - $280) on which a compensation rate is based.

In establishing the exact date that total disability became partial, it is not necessarily required that a Claimant be directly informed of job openings. In P & M Crane Co. v. Hayes, 930 F.2 424 (5th Cir. 1991) the Court stated: "An employer must present these job openings to the court to satisfy its burden of proof on the alternate employment issue, and not to employee so as to facilitate his job search. In Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540 (4th Cir. 1988) the court found no requirement that employer find currently available jobs or convey information about job openings to claimant. (See, also, Palombo, *supra*)

Reports were submitted by Mr. Hickey to the insurance carrier and Employer's counsel in October, November and December of 1999 and January, 2000, the latter of which

mentioned a scheduled hearing on January 19, 2000. It has not been demonstrated that these reports were forwarded to Claimant or his counsel, but likely that either or both were aware that these suitable alternative jobs may have been obtained by Employer's vocational expert. As discussed, above, moreover, direct knowledge by Claimant is not required. Further, since Dr. Lucie had made it clear by his release to work in October, 1999, a period roughly two full years after the injury, that Claimant could not return to his usual job as a crane operator, but that he could maintain an alternative job from a physical standpoint, I find that clearly the purposes of the Act are fulfilled by these reports taken in their entirety. The October report cites only one job that clearly is within the medical limitations and that job had an initial salary of only $6.00 per hour. I find, therefore, that the report of November 9, 1999 fulfills the requirement of finding suitable alternative employment and is the determinative date for the commencing of partial disability.

Knee Injury

Neither party has raised the issue of payment for permanent partial disability under the "schedule" for injury to the knee nor has there been indication that the Director provided a decision on the matter. Nevertheless, the issue would generally be raised as a part of the "nature and extent" of disability. Moreover, since the uncontradicted medical evidence is that there is a 2% impairment of the lower right extremity I find Claimant is entitled to such additional compensation and *sui sponte* make such an award, additionally since the amount in question is relatively of a very minor nature.

ORDER

1. Employer, Advantage Financial Group, shall pay Claimant, Wayne G. Smith, for temporary total disability from October 30, 1997 until November 9, 1999 based on an average weekly wage of $811.17. Thereafter, and continuing Employer shall pay Claimant for permanent partial disability based on a weekly loss of wage earning capacity of $531.17, less those amounts already paid.

2. Employer shall pay Claimant as provided under the schedule for a 2% loss of use of the right lower extremity.

3. Employer shall provide for all reasonable and necessary medical costs past, present and future, directly related to Claimant's industrial injury, less those already paid.

4. All calculations shall be made or verified by the District Director.

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JOHN C. HOLMES
Administrative Law Judge